Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)))	CG Docket No. 18-152 CG Docket No. 02-278

COMMENTS OF THE NATIONAL OPINION RESEARCH CENTER

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June 13, 2018

EXECUTIVE SUMMARY

The National Opinion Research Center at the University of Chicago (NORC) files this comment at the invitation of the Consumer and Governmental Affairs Bureau, to address two specific aspects of the Public Notice seeking comment on a range of Telephone Consumer Protection Act (TCPA) matters. As a contractor, NORC performs federal social science surveys that in many cases depend upon the ability to call or to text members of the public to create or to maintain statistically significant actionable information for the U.S. government. Thus, NORC has engaged in Commission proceedings that implicate its federal clients' ability to contact the public either directly or through the use of federal contractors.

In its *Broadnet Declaratory Ruling,* the Commission appropriately recognized the well-established need for and role of federal social science surveys that by necessity include random sampling for statistical significance and in some cases, oversampling, to capture critical information from underrepresented populations. Federal surveys on health, welfare and other matters inform and to direct critical national policies in a wide number of areas that directly touch on and improve the lives of the every American.

It is an irrefutable fact that federal statistics rely on representative telephone surveys of Americans and it is not possible to perform representative surveys without the ability to reach individuals in the 52.2 percent of U.S. households that the U.S. Center for Health Statistics estimates do not have landline phones, but who must be included in survey samples. A prior consent to be called framework is incompatible with the ability to contact individuals by wireless phone for an official government purpose. The fundamental nature of the call from a TCPA liability perspective should not change simply because the government has chosen to direct a third party to call the public on its behalf and pursuant to its continuing oversight.

NCLC's pending Petition for Reconsideration of this aspect of the *Broadnet Declaratory* Ruling failed to demonstrate that the Commission missed something material in its legal and policy analysis. NCLC relied only on unsubstantiated, broad-brush assertions that the *Broadnet Declaratory Ruling* will spark rampant, abusive calling of the public. This is nonsense. Given that the calls are coming from the federal government pursuant to its need for data that the government has determined that it can best get by telephone-based surveys, there is no basis for determining that public harm can come from these necessary calls. The Commission should reject these assertions as the unfounded speculation they are.

NORC supports the pending Petition for Reconsideration filed by the Professional Services Council (PSC) that sought clarification of the scope of the Commission's intended relief to federal government contractors that may be federal contractors but may not necessarily be "agents" for the federal government. NORC agrees that federal contracting terms vary and the Commission should not narrowly provide relief to only one type of federal contractor. The key to TCPA liability relief should be that the contractor is acting on behalf of and pursuant to contract with the federal government.

NORC also supports the Petition for Declaratory Ruling filed by the U.S. Chamber of Commerce and a number of other organizations, seeking a common sense, bright line Commission interpretation of the statutory term "automatic telephone dialing system" (ATDS), and the Commission's request for comment on how to narrow the scope of the term "capacity" to something that hews closely to the statute. The D.C. Circuit's unanimous opinion in *ACA International* provided much in the way of discussion and helpful guidance for the Commission as it reviews its prior interpretation of ATDS to align it to one more faithful to the statute.

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COMMENTS

The National Opinion Research Center at the University at Chicago (NORC) files this Comment to address two critical aspects of the Bureau's May 14, 2018 Public Notice[1] seeking comment on how the Commission might interpret the Telephone Consumer Protection Act (TCPA) in light of the decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC.*[2] Specifically, NORC provides its perspective on how the Commission should respond to the two pending petitions for reconsideration on its *Broadnet Declaratory Ruling,*[3] as well as how the Commission might revamp its statutory interpretations on what

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1 *See Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision,* CG Docket Nos. 18-152, 02-278, DA Docket No. 18-493, Public Notice (May 14, 2018) (the "TCPA Public Notice").

2 *ACA International v. FCC,* 855 F.3d 687 (D.C. Cir. 2018) ("*ACA Int'l*").

3 In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC, Petition for *Declaratory Ruling*, National Employment Network Association Petition for Expedited Declaratory Ruling and RTI International Petition for Expedited Declaratory Ruling, FCC 12-72, CG Docket No. 02-278, (rel. July 5, 2016) (*"Broadnet Declaratory Ruling*").

constitutes an automatic telephone dialing system or ATDS. NORC applauds the Commission's interest in addressing and resolving these complex legal and policy questions, questions that have vexed conscientious callers with the real prospect of facing TCPA lawsuits despite their having legitimate reasons to be contacting members of the public.

I. INTRODUCTION

Founded in 1941, NORC at the University of Chicago helped to establish and continues to strengthen the constantly evolving field of social science research.[4] Numerous data collection and analytical tools that now set the industry standard were pioneered at NORC. Since its early years—when wartime public polling first brought the organization to prominence—NORC has enriched public policy research and fact based decision making by gathering and distilling critical information and contributing to the creation of new bodies of knowledge. As a non-profit organization committed to serving the public good, NORC's work continues to inform decision makers and provides the foundation for effective solutions. NORC's research expertise grows out of its long history of working with government agencies, academic institutions, foundations, among other organizations. Its staff includes rigorously trained and widely published leaders from a diverse array of fields such as health, education, economics, security, mental health, criminal justice, the environment, international development, and more.[5] NORC's work is enhanced by its strong collaborative relationships with prominent experts, senior government

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[4] As one of the oldest not-for-profit, academic research organizations in the United States, and through its affiliation with the University of Chicago, NORC maintains the highest standards of professional excellence and scientific rigor, and is committed to broad dissemination of its findings.

[5] These experts are organized into substantive research departments and centers that collaborate with NORC's statistics, technology, and operations groups to deliver core capabilities to clients.

officials, and leading scholars, among others. NORC maintains a large and flexible field staff and call centers to support a variety of long-term and quick-response national and international projects.

NORC has direct and deep experience as a federal contractor for essential periodic federal government surveys. All federal surveys that NORC conducts for its federal clients that involve human subjects as respondents must be reviewed and approved by NORC's or the federal client's Internal Review Board (IRB), a committee that reviews and approves research involving human subjects.[6]

NORC previously engaged with the Commission on the significant legal and policy questions raised by RTI's Petition for Expedited Declaratory Ruling (the RTI Petition), a petition that was addressed and resolved in the *Broadnet Declaratory Ruling*.[7] This ruling answered a critical question about a federal contractor's exposure to potentially crippling TCPA liability simply for calling the public or segments of the public pursuant to contract on behalf of the federal government pursuant to a federal contract. NORC supports the determination that in matters of potential TCPA liability, contractors should stand in the shoes of the federal

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[6] The IRB's purpose is to ensure that all human subject research be conducted in accordance with federal, institutional and ethical guidelines.

[7] *See e.g.*, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, RTI International, the Consortium of Social Science Associations, the Council of Professional Associations on Federal Statistics, and NORC at the University of Chicago, Notice of September, 30, 2015 Ex Parte Meeting, CG Docket No. 02-278, (Oct. 05, 2015); In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, the Consortium of Social Science Associations, the Council of Professional Associations on Federal Statistics, and NORC at the University of Chicago, Notice of Oct. 15, 2015 Ex Parte Meeting, CG Docket No. 02-278, (Oct. 19, 2015).

government for the activities directed and overseen by the government and on behalf of the government.

NCLC filed both a Motion for Stay and a Petition for Reconsideration of the *Broadnet Declaratory Ruling.* NORC filed a formal Opposition to the NCLC Petition.[8] The NCLC Petition should be rejected on both procedural and substantive grounds. NCLC failed to timely raise its legal and policy concerns; however, it is abundantly obvious that its core concerns were raised by other commenters and were addressed squarely by the Commission. NCLC has not demonstrated that the Commission missed something material in its analysis.

There should be no question that the federal government needs effective ways to survey representative populations so as to measure and validate the effectiveness of the very programs that low income and other Americans access and depend upon. Thus, clarity about the legal liability of federal contractors for alleged TCPA violations is aspect of the *Broadnet Declaratory Ruling* is critically important. In that vein, NORC supports the clarification of the *Broadnet Declaratory Ruling* sought by the Professional Services Council.

Finally, the Petition for Declaratory Ruling filed by the U.S. Chamber of Commerce with other parties proposing that the Commission establish common sense, easily understood rules for what is considered to be an autodialer under the TCPA should be granted. The unanimous D.C. Circuit in *ACA Int'l* provided the agency with reasonable guidance on pertinent issues of what constitutes "capacity" and use, and the U.S. Chamber Petition tees up these issues in a comprehensive fashion for Commission action.

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[8] *See In the Matter of Rules and Regulations Implementing the)Telephone Consumer Protection Act of 1991*, NORC Opposition to NCLC Petition for Reconsideration, CG Docket 02-278 (Aug. 31, 2016), https://ecfsapi.fcc.gov/file/1083163340502/NORC%20Opposition%20Final.pdf.

II. IT REMAINS CRITICAL THAT CALLERS ACTING ON BEHALF OF THE FEDERAL GOVERNMENT HAVE EFFECTIVE PROTECTION FROM UNWARRANTED TCPA LIABILITY

As noted above, NORC filed a formal Opposition to the pending NCLC Petition for Reconsideration cataloguing its procedural and substantive deficiencies. These deficiencies have not been cured by the passage of time and the passage of time demonstrates that the concerns about abusive or harassing calls made on behalf of the federal government were over-hyped rhetoric entitled to no weight.

In its Petition, NCLC vainly argued that it lacked an opportunity to present legal and policy arguments against the relief sought by the RTI Petition and that no other entity raised the issued it presented in its reconsideration petition. This is an excuse, not a credible argument. It is undercut by the plain fact that comments on the RTI Petition were filed by several individuals who opposed the relief RTI sought both on the grounds that the statute could not be interpreted in the manner RTI urged as well as that consumers purportedly did not wish to receive autodialed calls on wireless phones from the federal government or government contractors. In fact, the *Broadnet Declaratory Ruling* cites these comments and reply comments in its discussion. NCLC could have filed comments, or even an ex parte filing while the RTI Petition was pending, but it did not. NCLC has no procedural basis to object to the *Broadnet Declaratory Ruling.*[9] Thus,

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[9] See 47 CFR 1.106(b)(2)-(3); *see, e.g.*, In re Aerco Broad. Corp., FRN No.: 0003759560, FCC DA 16-620, 2016 FCC LEXIS 1884, at ¶ 3-4 (F.C.C. June 7, 2016) (dismissing a petition for reconsideration because the petitioner's "arguments have all been previously raised and either dismissed or denied by the Commission, as well as by the Division" and therefore the petitioner "ha[d] not presented any new facts or arguments that warrant reconsideration under Section 1.106(b)(2)"); *see also* Doss v. FCC, 2004 U.S. App. LEXIS 9806, *1 (D.C. Cir. May 17, 2004) (noting that a party's "petition for reconsideration was not based on new facts or changed circumstances," and affirming that "FCC staff therefore permissibly dismissed the petition as repetitious.").

there is no reason for the agency to reconsider the same arguments that it considered before and rejected simply because the NCLC Petitioners claim to have been surprised by the result.

Were the Commission to overlook these defects and consider the Petition for Reconsideration on the merits, it is plain that NCLC has not provided the agency with anything that would require the Commission to change course. The NCLC Petition appears not to argue directly with the *Broadnet Declaratory Ruling's* holding that the federal government is not a "person" under the TCPA, but NCLC contests the Commission's determination that the federal government can conditionally extend that exemption to its chosen contractors.

Notably, the Commission recognized that prohibiting the federal government from making autodialed calls would impair, "in some cases severely" the government's ability to communicate with the public and to collect the data needed to form the basis of critical public policy determinations.[10] The Commission further determined that when a contractor is acting on behalf of the federal government, that it should not be treated as a "person" in that particular context. Otherwise, the Commission reasoned that under its precedent the government could be:

> vicariously liable for telephone calls placed by third-party agents acting within the scope of their actual authority. If the TCPA applied to contractors calling on behalf of the federal government, this rule would potentially allow the government to be vicariously liable for conduct in which the TCPA allows the government to engage. That would be an untenable result.[11]

Critically, this delegated prerogative of a federal contractor to call a wireless phone number using an autodialer without prior consent is not unbounded. The *Broadnet Declaratory Ruling* is plain that invocation of the government exemption can only be valid if the activity is authorized

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10 *Broadnet Declaratory Ruling at ¶ 15.*

11 *Id.* at ¶ 16.

by the government and the contractor is acting within the scope of its authority and instructions. Thus, if a government contract specified that there was to be no autodialing of wireless phone numbers, then the contractor who, contrary to these instructions, autodialed would not have the benefit of the exemption because in that case it would not be acting within the scope of its authority and instructions.[12]

Ignoring all this, the NCLC Petition elevates unsupported speculation about an anticipated surge of abusive calling as a justification to reverse this carefully crafted conditional exemption. Since release of the *Broadnet Declaratory Ruling* in July 2016, however, these overblown fears have not come to pass, and for good reason. NORC's extensive experience in federal statistical survey work confirms that there is ample protection of the public arising from the privacy, confidentiality and disclosure laws under which federal statistical agencies and their contractors must work to design and direct telephone-based, scientifically sound, and nationally representative surveys. Even if the Commission were to discount those protections, there must be a presumption that that federal government is not seeking to contact individuals to survey them in a harassing manner, and the government can take action if it finds its contractor misbehaving by acting outside of its authority. In that case, the contractor would not have the benefit of the government's exemption in any event.

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12 *See Campbell-Ewald*, 136 S. Ct. at 672-73 ("When a contractor violates both federal law and the Government's explicit instructions . . . no derivative immunity shields the contractor from suit by persons adversely affected by the violation . . . . Where the Government's authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress . . . there is no liability on the part of the contractor who simply performed as the Government directed . . . [but where] a Government agent had exceeded his authority or the authority was not validly conferred . . . the agent could be held liable for conduct causing injury to another.") (internal citations omitted)..

When the federal government chooses to do essential and legally mandated social science survey work by using contractors for the necessary public outreach and data collection, these contractors effectively stand in the shoes of the government for this purpose and only for this purpose. The social science survey work at issue is typically bid under an RFP for the qualitatively best or most cost effective proposal, and surveys are designed and conducted pursuant to Office of Management and Budget (OMB) direction and approval.[13] Regardless of the particular survey design and details of the work that is done, as a legal and policy matter there should be no difference in the TCPA liability for a government survey call whether the Centers for Disease Control and Prevention (CDC) or a CDC contractor places an autodialed call to a wireless phone to reach a survey interviewee.

Federal surveys on health, welfare and other matters to inform and to direct critical national policies in a wide number of areas that directly touch on and improve the lives of the very Americans NCLC claimed to represent.[14] These filings demonstrated that a prior consent to be called framework is incompatible with the ability to contact individuals by wireless phone for an official government purpose. Moreover, as a practical matter it should be plain that the

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[13] *See* Broadnet Declaratory Ruling at ¶ 11. In some but not all cases, the contractor's employees may become "sworn officers" for their work.

[14] The CDC, as an example, uses contractors for a range of health surveys on a range of subjects, including the BRFSS, the Behavioral Risk Factor Surveillance System, an annual survey conducted by contractors using Random Digit Dialing techniques on both landline and cell phones to collect data for federal and state use. *See* www.cdc.gov/brfss/about/brfss_faq.htm. The BRFSS is the premier U.S. health related phone survey that collects data about U.S. residents in all 50 states, in DC and three U.S. territories. The survey consists of over 400,000 adult interviews each year, and the data gained from the annual survey - that has been done each year since 1984 - provides powerful health risk data to target critical and effective health promotion activities.

federal government does not have the capacity to carry the number of employees required to perform a wide range of specialized ongoing and periodic surveys.[15]

If the federal government looks to contractors to fulfill its statutory or other legal responsibilities, it is critical that these contractors have some certainty about the legal status of the calls they make on behalf of and at the direction of CDC and other federal government clients. Without it, these entities operate under the severe threat of what could be massive per call statutory damages under TCPA class actions for work done at the direction of and under supervision by the federal government. There are a number of plaintiff firms that routinely solicit for plaintiffs to file such suits.

The Commission appears to have understood this, and was plain in holding that if the federal government was not a "person" under the TCPA, when it directs a third party to act on its behalf, that that third party should have the same protection as the federal government for in-scope, authorized activity. NCLC provided no sound reason for the Commission to reject or revise that view on reconsideration.

NCLC also mistakenly claims the *Broadnet Declaratory Ruling* provided some type of full and unconditional exemption from TCPA coverage to contractors. This of course misstates the actual holding of the *Broadnet Declaratory Ruling*. NCLC mischaracterizes the holding as:

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15 The conditions under which contracting is most cost-effective differs depending on the capacity of a particular federal agency and the periodicity of the survey at issue. There truly is no "one size fits all" answer and federal agencies should have the choice of performing data collection directly or indirectly. Critically, a number of studies are Congressionally-mandated and materially advance public health and welfare based on the information and insights they provide. Notably, much of the data collected by the federal government via telephone surveys is also used by state and local governments and NGOs to maximize the effectiveness of their programs, including most likely some of the entities that joined the NCLC Petition.

"all contractors who are agents of the federal government are exempt from TCPA coverage."[16] There is simply no basis from the *Broadnet Declaratory Ruling* to conclude there are no explicit limiting principles to the extension of governmental exemption to contractors.[17]

The NCLC Petition further identifies a range of troubling calling practices that it asserts will occur with impunity if federal contractors continue to make calls for the government.[18] There simply is no reason to believe the public has or will see any difference at all in the frequency or content of calls they receive from the federal government, regardless of whether they are placed by the government or by a contractor.[19] There is no reason to expect the federal government seeks to harass or annoy citizens. Conversely there is every reason that the Communications Act and the Commission's rules should be interpreted in a manner that advances the federal government's critical mission. The identity of the entity calling for the federal government – which is solely and uniquely in the hands of the federal government to determine – should not change the legal nature of the call.

Moreover, NCLC's overblown rhetoric ignores that the TCPA exemption is not absolute and in asserting that time of day or other common sense restrictions to wireless phones would

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16 NCLC Petition at 9.

17 *See Broadnet Declaratory Ruling* at ¶ 17: "we clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government and the government has delegated to the contractor its prerogative to make autodialed or prerecorded or artificial voice calls to communicate with its citizens."

18 NCLC Petition at 17-18.

19 *See* RTI Opposition to NCLC Request for Stay at 6, CG Docket No. 02-278, filed August 11, 2016.

never be relevant. Even if one could make an absolute statutory exemption argument that the federal government's social science surveyors may autodial calls to wireless phones at 3 am, it is not reasonable to assume any federal government agency or contractor would be so reckless as to place calls at that time. Not only would they be unlikely to reach a willing survey subject, they risk an antagonistic response.[20] Even if one were erroneously to assume that the government or its contractors did not care about bothering these would-be survey subjects, then one could reasonably conclude from a self-interested efficiency standpoint that the government or its contractors would want to spend their time in the most cost effective manner, meaning that they would call wireless phones that are likely to reach likely survey participants. There is nothing to substantiate the assertion that the federal government's calling by contractors would be reckless or unreasonable.[21] Tellingly, in the almost two years since the *Broadnet Declaratory Ruling* has been in place, there has been no reported spike in abusive social science survey calls by or on behalf of the federal government.

NCLC also incorrectly suggests that the Commission somehow misunderstood and then misapplied the Supreme Court's *Campbell-Ewald* opinion in reaching the conclusions it did about the role and legal status of contractors calling on behalf of the federal government.[22] In

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[20] Likewise, NCLC plainly failed to consider why, as a practical matter, either the federal government or its contractors would aim to make calls to public safety answering points or to emergency dispatch personnel or to hospital emergency rooms; none of those calls would be productive in terms of yielding survey subjects.

[21] While the Commission noted that it did not credit the overblown assertions that its action would create "an 'explosion of unwanted calls accompanied by chaos and abuse" the *Declaratory Ruling* stated that "we believe we have reached the best interpretation of Congress's intent to exempt the federal government from the prohibitions in section 227(b)(1), even if that interpretation might lead to more unwanted calls that would otherwise be the case." *Declaratory Ruling* at ¶ 22.

[22] Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (Jan. 20, 2016) *(Campbell-Ewald)*.

fact, the *Broadnet Declaratory Ruling* cited the Supreme Court case for its holding that the federal government is not a "person" under the TCPA.[23] NCLC cannot credibly claim otherwise as the *Broadnet Declaratory Ruling* is plain on its face that that is all the Commission relied on the case for that point, and not for any other purpose.[24]

Specifically, the Commission determined that if the federal government is not a person under the TCPA, then it could place calls to the public that would otherwise be prohibited under the TCPA if there was no prior consent to be called. The Commission also concluded that if the federal government chooses to delegate these same calling functions to a third party under its supervision, then the federal government's designee would be acting on behalf of the government and for that particular activity would have the benefit of the government's exemption.

NORC understands that then Commissioner Pai dissented to the legal conclusion reached by the full Commission that the government's TCPA exemption can be shared by federal contractors because in his view contractors, unlike the federal government, are "persons" under the statute. He viewed the unequal level of TCPA liability protection when a call is placed directly versus indirectly to be compelled by the TCPA's statutory language. Commissioner Pai did not, however, discount the importance of the federal contractor's concerns about potential crippling TCPA liability; he suggested that implied sovereign immunity is available to contractors acting on behalf of the government.[25] However the Commission determines it will

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23 *Broadnet Declaratory Ruling* at ¶¶ 20-22.

24 *See Broadnet Declaratory Ruling* at ¶ 20.

25 *See* Pai Dissent in *Broadnet Declaratory Ruling.*

deal with the contractor liability question, on review, NORC urges that the agency take care to not disrupt or disturb the defenses contractors already may possess. Moreover, the agency should seek to build upon them in a helpful manner that reinforces the government's options to choose to use contractors when that is the efficient choice.

Another pending Petition for Reconsideration filed by the Professional Services Council (PSC) makes an important point of the need for clarification of the scope of the *Broadnet Declaratory Ruling.*[26] PSC states, and NORC can attest from its own experience, that there are a range of federal surveys or other services contracted for that disclaim an "agency" relationship as between the particular government agency and its chosen contractor. As PSC urges, the *Broadnet Declaratory Ruling* can and should be read that a contractor need not be designated an "agent" in order to be acting on behalf of the agency who has contracted for the work to be performed and thus operating within the government's prerogative - assuming the work is authorized and the calling is within the scope of the designated work.

III DEFINITIONS OF WHAT CONSTITUTES AN ATDS SHOULD BE BASED ON THE STATUTE, COMMON SENSE AND ON THE ACTUAL USE OF DIALING EQUIPMENT.

The Bureau also seeks public comment on the need to clarify the definition of automatic telephone dialing system (ATDS) in light of the D.C. Circuit's guidance in its recent *ACA Int'l.* decision. The TCPA Public Notice appropriately identifies the threshold question of "how to more narrowly interpret the word 'capacity' to better comport with the congressional findings and the intended reach of the statute."[27] In answering this question, the agency should reject the

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26 *In the Matter of Rules and Regulations Implementing the)Telephone Consumer Protection Act of 1991*, Professional Services Council Petition for Reconsideration, CG Docket No. 02-278, (Aug. 4, 2016), https://www.fcc.gov/ecfs/filing/10726059270343.

27 TCPA Public Notice at 2.

prior ruling's adoption of a "potential capacity" test as rendering the Act's definition of ATDS essentially meaningless. NORC endorses the U.S. Chamber Petitioners request that the Commission give full weight to the statutory definition and create bright line guidance that requires actual use of ATDS capabilities in order for calls to be subject to the TCPA's restrictions.

As the U.S. Chamber Petition observes, Congress enacted the TCPA in 1991 to stop an abusive form of cold-call telemarketing and fax-blast spamming: dialing random or sequential numbers.[28] In promulgating its initial rules implementing the Act, the Commission acknowledged the TCPA's goal of "restrict[ing] the most abusive telemarketing practices."[29] As then-Commissioner Pai observed, "Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists."[30] At the same time, the Commission has recognized repeatedly that the TCPA should accommodate businesses' legitimate interests in communicating with consumers or the public.[31]

TCPA litigation has proliferated not against abusive spoofers and scammers, but against legitimate businesses attempting to communicate lawfully, which unfortunately by

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28 *See* S. Rep. 102-178 at 1-2 (1991) (stating that the purpose of the TCPA is to "plac[e] restrictions on unsolicited, automated telephone calls to the home" and noting complaints regarding telemarketing calls); H.R. Rep. No. 102–317 at 6-7 (1991) (citing telemarketing abuse as the primary motivator for legislative action leading to the TCPA).

29 *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Report and Order, 7 FCC Rcd. 8752, n.24 (Oct. 16, 1992) *("1992 Report and Order").*

30 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8072 *("Omnibus Order")* (Dissenting Statement of then-Commissioner Ajit Pai) ("Pai Dissent").

31 *See Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, ¶ 21 (2012).

their very nature are "softer" litigation targets. Given the availability of statutory damages on a per call basis, the TCPA has turned into fertile ground for lawsuits brought by serial plaintiffs and their lawyers.

The Commissioner's 2015 *Omnibus Order* exacerbated this problem in a number of areas by the adoption of an extremely broad interpretation of the term "capacity" as used in the Act's definition of ATDS.[32] This expansive reading included not only devices that can generate random or sequential numbers, but also those that cannot. For example, it swept in devices that, though they do not currently autodial, could be modified to do so at some time in the future.[33] Then-Commissioner Pai noted that this interpretation was in his view "flatly inconsistent with the TCPA."[34]

The D.C. Circuit vacated aspects of the *Omnibus Order* in *ACA Int'l*, including the Commission's interpretation of the terms ATDS. The court held that the agency's interpretation of capacity was "incompatible with" the statute's goals, and "impermissibly"

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32 *Omnibus Order*, ¶ 15. *See also* 47 U.S.C. § 227(a)(1) (defining ATDS to mean "equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers").

33 *Omnibus Order*, ¶¶ 10-14.

34 Pai Dissent, 30 FCC Rcd at 8074. As he observed: "[t]he statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do those two things—if it cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers—then *how can it possibly meet the statutory definition.*" As he observed: "[t]he statute lays out two things that an automatic telephone dialing system must be able to do or, to use the statutory term, must have the 'capacity' to do. If a piece of equipment cannot do those two things—if it cannot store or produce telephone numbers to be called using a random or sequential number generator and if it cannot dial such numbers—then how can it possibly meet the statutory definition."

expansive.[35] The court held that Commission's stated interpretation that a device's capacity could include "features that can be added to the equipment's overall functionality through software changes or updates" had "the apparent effect of embracing any and all smartphones"[36] to be so unreasonable that it was "considerably beyond the agency's zone of delegated authority."[37] It also found that the Commission had offered an inconsistent and "inadequa[te]" explanation of what features constitute an ATDS,[38] as a result, "fall[ing] short of reasoned decisionmaking."[39]

The Bureau's invitation to comment on the D.C. Circuit's holdings on the ATDS definition presents the Commission with the opportunity to build a record that can be used to provide practical guidance to those businesses and other entities that seek to comply with the TCPA while still making use of modern technology. NORC agrees with the U.S. Chamber Petitioners that the Commission should confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

The TCPA defines an ATDS as a device that has the capacity to "store or produce telephone numbers to be called, using a random or sequential number generator; and to dial

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35 *ACA Int'l*, 885 F.3d at 699-700.

36 *Id.* at 695-96.

37 *Id.* at 698.

38 *Id.* at 702-03.

39 *Id.* at 701.

such numbers."[40] Each aspect of this definition must be satisfied in order for the statute to restrict calling. A device must be able to generate numbers in either random order or in sequential order and that same device also must be able to store or produce those numbers called using that random or sequential number generator.[41] This ability to store or produce telephone numbers to be called is insufficient, standing alone, to satisfy the statute, as the clause "using a random or sequential number generator" modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator. The device also must be able to dial those numbers. If the device in question cannot perform all of these functions, then it cannot meet the statutory definition of an ATDS. Clarification of these basic requirements would be a critical step towards assisting legitimate callers by confirming that both elements of the statutory definition be given meaning and be satisfied for a device to constitute an ATDS.

As part of the review process, the Commission should also address the actual versus the theoretically possible functioning of a device by judging "capacity" at the time a call is placed.[42] As Chairman Pai has observed, this "present capacity" or "present ability" approach is reflected in the text and purpose of the statute, the Commission's earlier

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40 47 U.S.C. § 227(a)(1)(A)-(B) (emphasis added).

41 47 U.S.C. § 227(a)(1)(A).

42 47 U.S.C. § 227(a)(1). The statute uses the present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to potential or theoretical capabilities. The statute uses the present tense to limit the use of equipment that "has the capacity" to perform the ATDS function and makes no reference to potential or theoretical capabilities.

approaches to the TCPA, as well as common sense.[43] This approach also has the advantage of providing a bright-line rule to those legitimate callers seeking means to comply with requirements. This approach also would be consistent with the Commission's existing authority to make rules in this space.

In clarifying which devices qualify as an ATDS, the Commission also should hold that devices that require alteration to add autodialing capability are not ATDS. As the U.S. Chamber Petition observes, the issues with applying this approach be that calling equipment could become an autodialer simply by clicking a button on a drop-down menu and enabling a capability. This is because that function is already part of the device and requires only a simple change in a setting rather any real alteration of the device. However, as noted below, devices with these inherent capabilities are an ATDS only when the specific ATDS capabilities are actually in use.

Further, the absence of human intervention is what makes an *automatic* telephone dialing system automatic and the Commission should address this point head on. While in the past the Commission stated that the basic function of an ATDS is to dial numbers without human intervention,[44] the Commission in 2015 determined that a device might qualify as an ATDS even if it cannot dial numbers without human intervention, but that the Commission could evaluate each circumstance on a case by case basis.[45]

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43 *See, e.g,* Pai Dissent ("Had Congress wanted to define automatic telephone dialing system more broadly it could have done so by adding tenses and moods, defining it as 'equipment which has, has had, or could have the capacity.' But it didn't.")

44 *2003 TCPA Order* ¶ 132; *2008 Declaratory Ruling*, ¶ 13.

45 *Omnibus Order* ¶ 17.

NORC respectfully suggests that the Commission provide additional clarity, so that callers that employ human intervention are not left without concrete guidance as to whether their activities are questionable. Namely, if human intervention is required in generating the list of numbers to call or in the making of a call, then the equipment in use is not "automatic," and as such the calls being placed are not being placed by an ATDS.[46] From the point of view of those businesses seeking a straightforward, common sense rule to follow, this clarification would be far preferable to an ad hoc, case-by-case analysis that fails to provide the sort of direction businesses seek.

In the *Omnibus Order*, the Commission applied the TCPA's prohibitions to any call using a device that *could be* an ATDS, without considering whether the call was made using ATDS capabilities.[47] In striking down this interpretation, the D.C. Circuit outlined an alternative approach, one raised by Commissioner O'Rielly that reinterprets the statutory phrase "make any call . . . using [an ATDS]" as used in the statute.[48] The court suggested that this statutory language can be read to require a caller to use the statutorily defined functions of an ATDS to make a call for liability to attach.[49] The court also noted that this construction

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46 *2003 TCPA Order*, ¶ 132 ("The basic function of such equipment, however, has not changed– the *capacity* to dial numbers without human intervention."). It also heeds the D.C. Circuit's suggestion that the absence of human intervention is an important indicator, "given that 'auto' in autodialer—or equivalently, 'automatic' in 'automatic telephone dialing system'—would seem to envision non- manual dialing of telephone numbers.'" *ACA Int'l*, 885 F.3d at 703 (citation omitted).

47 *Omnibus Order*, ¶ 19 n.70.

48 *Id.* at 703-04; *see also* 47 U.S.C. § 227(b)(1)(A) ("It shall be unlawful . . . to make any call . . . using any automatic telephone dialing system . . . .").

49 *ACA Int'l*, 885 F.3d at 704.

would "substantially diminish the practical significance of the Commission's expansive understanding of 'capacity' in the autodialer definition"[50] A device's potential capabilities would not be relevant because the analysis would focus only on the actual functions *used* to make the call.[51]

Adopting this straightforward reading would ensure that potential TCPA liability attaches only when ATDS capabilities are used to make a prohibited call, rather than sweeping in calls made using smartphones, tablets, and other devices that conceivably could be modified to support autodialing functions via an ATDS. Businesses need this guidance, and it would help companies avoid unnecessary litigation over whether they used an ATDS when placing calls. Consistent with the court's suggestions, the plain text of the statute, and the extensive comments on ATDS issues by the U.S. Chamber Petition, NORC urges the Commission to adopt these common sense interpretations.

IV. CONCLUSION

Telephone-based social science surveys require permission-less access to cellphones and many surveys require reaching under-represented or low income populations, such as those NCLC states it represents, so that they can be better served by more informed federal government decision making on health and welfare resources and on many other critical societal matters. NCLC's unfounded complaint about federal contractors acting recklessly or wantonly on behalf of and under the supervision of the federal government is based on unsubstantiated fears, and not fact and should be rejected. NORC supports the Petition for Reconsideration of

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50 *Id.*

51 One benefit of incorporating this aspect into any Commission rule revision is that it would ensure that devices that are capable of being modified so as to incorporation autodialer functions, such as smartphones, are only subject to the TCPA when the modified device actually is used as an autodialer.

the *Broadnet Declaratory Ruling* filed by the Professional Services Council seeking an important clarification of the range of contractor arrangements the federal government may employ. NORC supports the Commissioner's ATDS efforts to harmonize its ATDS rules with the statute and to provide plain guidance to the public what calls are subject to the statutory requirements and which are not.

Respectfully submitted,

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June 13, 2018